

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

SCOTT ALAN EYRICH,

Defendant-Appellee.

UNPUBLISHED
November 13, 2003

No. 240758
St. Clair Circuit Court
LC No. 01-002386-FC

Before: Bandstra, P.J., and Hoekstra and Borrello, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting defendant's motion to dismiss the case based on double jeopardy. We reverse and remand. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant was charged with criminal sexual conduct in the first degree, the victim being under thirteen years of age, MCL 750.520b(1)(a), as a result of allegations made by complainant, his seven-year-old daughter. Barbara Butler, a child protective services worker and prosecution witness, testified that she and a police officer went to defendant's home to investigate the allegations against defendant, and that she and another officer returned to the home two days later because additional concerns had arisen. She was given permission to look around the home and was shown certain items upon request. In response to a question regarding the areas of the home she inspected, Butler stated that she went into an office/computer room because the officer who accompanied her on the earlier visit had noticed some pornographic materials in that room. Defense counsel objected immediately,¹ and the prosecution ended its questioning of Butler.

The following day defendant moved for a mistrial based on the introduction of the evidence that pornographic material was present in the home. The trial court reviewed the transcript from the previous day, observed that the prosecution's questions seemed designed to introduce evidence that pornographic material was present in the home, and granted defendant's motion for a mistrial.

¹ After the jury was empanelled and sworn but prior to the commencement of testimony, defendant requested a hearing on the admissibility of evidence that pornographic material was present in his home. The trial court agreed to hold a hearing at an appropriate time. The hearing was not held prior to Butler's testimony.

Subsequently, defendant moved to dismiss the case based on double jeopardy. He argued that his motion for a mistrial was necessitated by the prosecutor's intentional misconduct in introducing evidence regarding the presence of pornographic material in the home. The trial court granted the motion, concluding that based on the objective facts, the prosecutor's intentional misconduct forced defendant to move for a mistrial, and that retrial was barred under the circumstances.

Both the United States and Michigan Constitutions prohibit placing a defendant twice in jeopardy for the same offense. US Const, Am V; Const 1963, art 1, § 15. Unless the defendant consents to the interruption of the trial or a mistrial is declared due to manifest necessity, the defendant cannot be brought to trial again. *People v Mehall*, 454 Mich 1, 4; 557 NW2d 110 (1997). A mistrial granted on the defendant's own motion or with his consent, unless prompted by prosecutorial conduct intended to provoke the mistrial request, waives double jeopardy protections. *Oregon v Kennedy*, 456 US 667, 675-676; 102 S Ct 2083; 72 L Ed 2d 416 (1982); *People v Lett*, 466 Mich 206, 215; 644 NW2d 743 (2002); *People v Dawson*, 431 Mich 234, 253; 427 NW2d 886 (1988). In determining a prosecutor's intent, the trial court should rely on the objective facts and circumstances. *Dawson, supra*, 257. Its findings will not be disturbed on appeal unless they are clearly erroneous. *Id.* at 258. A double jeopardy claim presents a question of law that we review de novo on appeal. *People v Herron*, 464 Mich 593, 599; 628 NW2d 528 (2001).

We reverse the trial court's order granting defendant's motion to dismiss based on double jeopardy, and remand this matter for a new trial. The trial court clearly erred in finding that the prosecution deliberately introduced the evidence in a manner that was designed to appear inadvertent. *Dawson, supra*. The prosecution questioned Butler regarding her return visit to defendant's home. In response to the question of what areas of the home she inspected, Butler stated that she went to the office/computer room because a police officer had observed pornographic material in that room. The prosecution did not ask why Butler went into the room, and did not ask what items she might have been interested in viewing there. The question that prompted the response to which defendant properly objected was directed solely at what areas of the home Butler inspected. Butler gave a nonresponsive answer to the question.² The objective facts and circumstances do not support the trial court's finding that the prosecution deliberately and prematurely introduced evidence that defendant possessed pornographic material with the intent of goading defendant into moving for a mistrial. The trial court erred in concluding that retrial was barred on double jeopardy grounds. *Kennedy, supra*.

We reverse and remand. We do not retain jurisdiction.

/s/ Richard A. Bandstra

/s/ Joel P. Hoekstra

² Generally, a nonresponsive, volunteered answer to a proper question is not a ground for granting a mistrial. *People v Griffin*, 235 Mich App 27, 36; 597 NW2d 176 (1999). The propriety of the trial court's decision to grant defendant's motion for a mistrial is not before us.